pay under the General Orders if he was qualified under paragraph 192. It has been held by the trial judge that he did not so qualify and his counsel before the Board did not seriously maintain to the contrary.

However, a further and fatal objection to his claim under the General Orders is paragraph 192(ii) whereby any question as to whether an officer is entitled to inducement pay is for the Governor in Council whose decision is final.

Their Lordships therefore proceed to consider whether the appellant can succeed in his third declaration by reason of the terms of his contract. As has already been stated the original advertisement which excited the appellant's interest was extremely general but did refer to the fact that expatriation pay was payable and it is common ground that such pay is the same as inducement pay. The learned trial judge described this advertisement as no more than an offer to treat which formed no part of the offer of the Secretary of State contained in his letter of 12th June 1958. Their Lordships agree but in their opinion the position is more accurately expressed in the judgment of Harley A.C.J. who pointed out that a formal offer was made by the Chief Secretary of Sarawak to the appellant in a letter dated 6th December 1958 which was accepted by the appellant on 11th December 1958; and in their Lordships' opinion it is these documents which constituted the contract upon which the appellant must rely. While the letter of 6th December 1958 incorporated the Secretary of State's letter of 12th June 1958 it nowhere referred to the advertisement which in their Lordships' opinion cannot therefore in any event be referred to by the appellant in construing the terms of his contract.

However the incorporation of the Secretary of State's letter of 12th June 1958 which stated that allowances were payable at the rates shown in the memorandum necessarily incorporates that document.

The memorandum has a heading "paragraph 3, *Allowances*", but there is no mention under this heading of inducement allowances. Inducement pay is only mentioned incidentally in paragraph 7, "*Widows and Orphans Pensions*", in this form, "the rate of contribution is 5 per cent of salary plus inducement pay, subject to a maximum of $50 per month". It was argued that this paragraph by itself entitled the appellant to inducement pay. Their Lordships do not agree. In their view the proper interpretation of this paragraph is that there is set out the rate of contribution for Widows' and Orphans' Pensions and this rate is fixed at 5 per cent of the salary and, if inducement pay is payable, the contribution will be at the rate of 5 per cent on the additional sum for inducement pay. Their Lordships therefore reach the conclusion that the courts below were right in refusing the appellant his third declaration. The appeal therefore fails.

Their Lordships will accordingly report to the Head of Malaysia their opinion (1) that the order of the High Court of Sarawak dated 10th September 1965 ought to be varied by adding thereto a further recital that the order was made upon the court taking in account that the respondent (defendant) conceded that the appellant (plaintiff) had been a member of Her Majesty's Overseas Civil Service since 1st December 1958; (2) that the order of the Federal Court of Malaysia dated 18th October 1966 ought to be varied so as to provide that the respondent pays the appellant's costs in the High Court of Sarawak; (3) that save as aforesaid the appeal ought to be dismissed and the orders of the High Court and the Federal Court affirmed; (4) that there ought to be no order as to costs before the Board.

Appeal dismissed.

Solicitors: *Hatchett Jones & Co.; Stephenson Harwood Tatham.*

MOHAMED BIN KASDI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali J.) October 26, 1968]
[Johore Bahru — Criminal Appeal No. 34 of 1968]

Penal Code s. 420 — Cheating — Necessary evidence of deception.

Evidence — Witness making two differing statements — Credibility or otherwise of.

To sustain a charge of cheating there must be evidence of deception practised upon a person who is thereby dishonestly induced to part with his money.

No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

Cases referred to:—

(1) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, C.A.

(2) *De Silva* v. *Public Prosecutor* [1964] M.L.J. 81.

MAGISTRATE'S CRIMINAL APPEAL.

Charles N. Mendis for the appellant.

Fong Seng Yee (Deputy Public Prosecutor) for the respondent.

Ali J.: The appellant was convicted by the president, sessions court, Batu Pahat, for an offence of cheating under section 420 of the Penal Code and was sentenced to 4 months' imprisonment.

The prosecution's case briefly was that the appellant had obtained a sum of $200 from the complainant, Hamzah bin Haji Mohamed Som, P.W.3, on a false representation that the money

was required for an interview to be held for the purpose of selecting candidates to fill the vacancies of religious teachers. The complainant was one of the candidates. That the money consisting of two $50 notes and ten $10 notes was paid to the appellant on the 12th April, 1967, was established by the evidence of the complainant himself, his father (P.W.7), and another witness named Mohamed Rajlis bin Murib, P.W.10. The payment was made at the appellant's house. On the evidence before him the learned president was fully justified in his conclusion that money had passed. But this finding alone was not sufficient to support a charge of cheating. There must in addition be evidence to show that the complainant was induced to make the payment by a false representation moving from the appellant or to use the words in the charge "by deceiving him into believing that the sum of $200 was necessary for an interview for the post of a religious teacher. . ." On this point the prosecution relied on the evidence of the complainant and also of his father who, needless to say, was an interested witness. According to them the money was required to pay the cost of an interview. In his grounds of decision the learned president was satisfied that the complainant and his father were ordinary kampong folks who trusted the appellant who was a *naib penghulu* in the kampong. The president was also satisfied that the complainant had been easily deceived by the appellant's representation that money was required to pay for the cost of an interview which, on the evidence of other witnesses, was in fact not necessary. One of the questions raised in this appeal was that the learned president had erred in fact in finding that the complainant was deceived. There could be no doubt from the evidence on the record that the complainant had made it to appear to the trial court that he was deceived. The question necessarily turned on whether he was a truthful witness as to the fact that he was deceived. No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness. In this case it would be wrong to pretend that the complainant had not made two statements in respect of the same matter. I am, of course, referring to the letter P.1 which he wrote to the State Secretary and also to his oral evidence. This letter was admitted as evidence for the prosecution and contained a number of things which could reasonably lead to the conclusion that it was written by the complainant. Quite apart from this there was also the evidence of the Assistant State Secretary which could leave no room for doubt that it was the complainant who wrote the letter. Unfortunately in this case the learned president has avoided making a definite finding on this issue although he did suggest in his judgment that if the complainant had in fact written the letter he must be regarded as a liar. Nevertheless the learned president felt convinced that the complainant was a truthful witness in view of the corroborative evidence of P.W.7, P.W.9 and P.W.10 and having regard to the decisions of Thomson C.J. in *Khoon Chye Hin* v. *Public Prosecutor*.[1] and that of Gill J. in *De Silva* v. *Public Prosecutor*.[2] With all due respect to the learned president it must be stated that except for the evidence of P.W.9, who was obviously an interested witness being the father of the complainant, the corroboration afforded by the evidence of P.W.10 was only in respect of the passing of the money. As regards the evidence of P.W.9, there was nothing to suggest that he even knew of the passing of the money.

As far as the appellant was concerned, he had every right to rely on the letter as a clear admission by the prosecution that the complainant had made two different statements in respect of the same matter. In the letter he gave a different figure of $300 and made no secret of the fact that he knew the money was being used as gratification for certain government officials connected with the work of interviewing candidates. In his evidence, however, he strenuously maintained that he gave $200 to the appellant and he did so because it was represented to him that the money was required to pay for the cost of interview as though it was some form of official fee or charge which every candidate would have to pay. That this was the line of the prosecution case seems clear from the nature of the question put to the president of religious affairs, P.W.2, who replied in these words: "No fees are payable in respect of interview." This I must say, was the weakest point in the prosecution case. To sustain a charge of cheating there must be evidence of deception practised upon a person who is thereby dishonestly induced to part with his money. There was no such evidence before the court. Undoubtedly the complainant was anxious to be selected for one of the vacant posts and the evidence clearly suggests that he would go to some length of trouble to be successful in his application. Even his evidence at the trial suggests that he knew that the money paid to the appellant could not be a form of official fee or charge as otherwise he would not have bargained for a reduction from $250 to $200. The true position, as it appears to me from the evidence, was that the complainant had enlisted the assistance of the appellant in an attempt to obtain the post of a religious teacher. Between themselves preparations were made to bribe certain officials of the government, but for some reason or other the money was not or could not be handed over. On the official rejection of his application the complainant was naturally annoyed with the appellant and did not hesitate to bring the matter into the open by writing the

letter P.1 to the State Secretary. This led to the police investigation for corruption, hence the original charge under the Prevention of Corruption Act. But for reasons which need not detain me here it was subsequently decided to amend the charge to one of cheating upon the assumption — the wrong assumption — that the complainant had been deceived when in fact he was not. Whether the appellant had committed any other offence in law is not a matter for me to say. But, as far as this appeal is concerned, it must for the reasons already stated be allowed. There will, therefore, be an order that the conviction be quashed and sentence set aside.

Conviction quashed and sentence set aside.

Solicitors: *Mendis & Loh.*

PAHANG LIN SIONG MOTOR CO. LTD. & ANOR. v. KARTAR KAUR & ANOR.

[F.C. (Azmi C.J. (Malaya), Ong Hock Thye & Suffian F.JJ.) November 4, 1968]

[K.L. — Federal Court Civil Appeal No. X.32 of 1968]

Negligence — Highway — Accident — Bus encroaching on to path of oncoming car — Conflicting evidence — Cause of accident — High speed and violent braking — Car going out of control before accident — Claim for damages.

Damages — Claim for — Whether there was contributory negligence — Deprivation of damages.

This was an action by the legal representatives of one *K.S.* deceased against the appellants, the owners and driver of an omnibus, for negligence as a result of which the deceased was killed. At the trial the High Court held the appellants liable for negligence, and the deceased was found guilty of contributory negligence to the extent of 25%. On appeal it was contended that the deceased was entirely to blame for the accident.

There were only two witnesses to the accident, one *S* a clerk of the deceased who was in the car with the deceased and the other the driver of the omnibus. Both witnesses gave conflicting evidence and the learned trial judge opted in favour of the evidence of *S* and held that the omnibus "swerved to the middle of the road when negotiating the bridge and thereby encroached into the path of the oncoming car. It was therefore the negligence of the appellant driver which caused the accident".

Held, allowing the appeal: (1) the negligent encroachment by the bus on its wrong side of the road was in the circumstances not necessarily the only possible explanation for the car going out of control nor the most probable as the term "unthinkable" referring to alternative causes would imply;

(2) after consideration of all the circumstances the unfortunate accident was in all probability due to a combination of two factors, i.e., high speed and violent braking at the bend due to an error of judgment by the deceased.

Case referred to:—

(1) *Yuill* v. *Yuill* [1945] P. 15, 19-20.

FEDERAL COURT.

T.S. Tan for the appellants.

T.S. Sidhu for the respondents.

K.L. Hee for A. Subramaniam.

Cur. Adv. Vult.

Ong Hock Thye F.J.: At about 8.30 a.m. on June 16, 1964 the late Mr. Kehar Singh, an advocate and solicitor practising in Kuala Lumpur, was driving his car, a Mercedes Benz 190D, from Rawang towards Kuala Lumpur, with Mr. Subramaniam his clerk seated beside him, when the car came into violent collision with an oncoming motor omnibus in the vicinity of a bridge at the 12½ mile. Mr. Kehar Singh died the same afternoon of shock and haemorrhage from fractured ribs and laceration of the left lung. Mr. Subramaniam suffered lesser injuries.

In actions brought respectively by the legal representatives of Mr. Kehar Singh and by Mr. Subramaniam, which were consolidated at the trial, it was held that the appellants, the owners and driver of the omnibus were liable for negligence, but that Mr. Kehar Singh himself was also contributorily negligent to the extent of 25%. Judgment was accordingly given against the appellants for 75% of the amount of agreed damages. It is now argued that on the evidence, Mr. Kehar Singh was entirely to blame.

Only two witnesses gave evidence at the trial, Mr. Subramaniam for the plaintiffs and the driver of the omnibus for the defendants. Their evidence was, however, supplemented by an agreed bundle of documents, consisting of the Road Transport examiner's report of the damage sustained by the two vehicles, a police report made by the appellant driver at Rawang less than an hour after the accident, a sketch plan made by police inspector Mohamed Tahir of the scene of accident, 6 photographs taken at the same time and the evidence recorded at an inquiry held by a magistrate on October 13, 1964 under the provisions of Chapter XXXII of the Criminal Procedure Code. It may be noted that both the trial witnesses had given evidence at the enquiry within 4 months, while their recollections of the accident were still fresh.

It was the plaintiffs' case that, while the vehicles were approaching the bridge from opposite directions, the omnibus, which had been travelling in a normal manner, swerved as it entered the bridge, into the path of the oncoming car, leaving Mr. Kehar Singh no choice but to apply his brakes violently, as a result of which his car skidded and crashed into the omnibus.

The defendants' case, on the other hand, was that, after Mr. Kehar Singh had taken a bend at high speed, some 50 to 60 yards before the bridge, his car began to pursue an erratic course as it approached the bridge and, notwithstanding that the bus swerved towards the grass verge on its left to avoid a collision, the car crashed into it.